

87. Further, Complainants do not believe this is an appropriate question for EAI even to pose. EAI has taken the position that the Commission does not have the authority to determine the engineering standards a utility may set. EAI's request that the Commission make a determination on how grandfathering and exceptions are to be applied is consistent with its position. [EAI posed this question in the alternative, and does not concede jurisdiction. It is inappropriate for Complainants to suggest that EAI is limited to the jurisdiction questions it posed. Rather, Complainants have consistently argued that EAI has misapplied or declined to apply the grandfathering provision of the NESC, which would clearly necessitate a determination by the Commission as to how, if at all, the provision applies if in fact it finds it has jurisdiction.]

b) EAI

88. *Grandfathering.* Grandfathering allows an attacher to adhere to a prior standard if a facility meets the engineering specification for the NESC edition in effect at the time of installation.¹⁴¹ Grandfathering is only necessary and appropriate where a prior standard is less stringent than a current standard.¹⁴² The Cable Operators' arguments regarding grandfathering, therefore, are largely academic given that the contract standards have not changed since their inception, and "grandfathered" attachments would be adhering to the same contract standards today as were

¹⁴¹ NESC at .013.

¹⁴² Buie Decl. Resp. Ex. 4 at ¶ 48.

in place 20 years ago.¹⁴³ [Complainants cannot stipulate to any of EAI's statements of fact or law for the reasons explained above.]

89. EAI agreed, however, as an accommodation to encourage clean up of the Cable Operators' plant, to allow corrections to the standard of the NESC for violations identified during the safety inspections. EAI further indicated that if the Complainants provided a certification from an Arkansas-licensed professional engineer ("P.E. certification") that an installation qualifies for grandfathering and is in compliance with the NESC edition that corresponds to the date of the facility's installation, EAI will accept the certification and consider such an installation compliant.¹⁴⁴

90. Grandfathering, however, is specific to the pole and the equipment in question, and requires evidence of the installation date of equipment and any significant upgrades or changes to the equipment in order to determine which version of the code applies (and whether the facility meets that standard).¹⁴⁵ EAI does not have information as to the age, installation date, or modification date of the Complainants' plant to gauge the application of grandfathering, and it is the Complainants who are in the best position to have this information.¹⁴⁶ The Cable Operators have not provided EAI with any evidence as to the age of their equipment or installations on a particular

¹⁴³ Buie Decl. Resp. Ex. 4 at ¶ 31, 48; Bettis Decl. Resp. Ex. 3 at ¶ 8; Harrell Decl. Resp. Ex. 8 at ¶¶ 7, 11-15; Kelley Decl. Resp. Ex. 11 at ¶¶ 3-5; Willems Decl. Resp. Ex. 20 at ¶¶ 8; Neumeier Decl. Resp. Ex. 14 at ¶ 8.

¹⁴⁴ Kelley Decl. Resp. Ex. 11 at ¶¶ 6-9.

¹⁴⁵ NESC at 013; Buie Decl. Resp. Ex. 4 at ¶ 44-49.

¹⁴⁶ Buie Decl. Resp. Ex. 4 at ¶ 49; Tabor Decl. Resp. Ex. 17 at ¶¶ 13-14.

pole that would permit an evaluation as to whether that particular facility was attached in compliance with the version of the NESC applicable at the time of installation, nor has it provided a P.E. certification to this effect.¹⁴⁷ In any event, it should not be EAI's place to determine if grandfathering applies to Complainants' facilities; they should make that determination themselves and certify that to EAI.

91. *Exceptions.* EAI is not required to limit its standards to the NESC or employ exceptions to NESC rules. In most instances, however, EAI's standards conform with the basic provisions of the NESC except that they do not employ complex and time-consuming calculations needed to make use of certain exceptions to the NESC.¹⁴⁸ Nevertheless, EAI agreed, as an accommodation to encourage clean up of the Cable Operators' plant, to allow corrections to the standard of the NESC for violations identified during the subject safety inspections and the use of exceptions. Where the Complainants provide a P.E. certification that an installation qualifies for an exception to the general NESC rule and is in compliance with the terms of that exception, EAI will accept the certification and consider such an installation compliant. Like grandfathering, however, such an evaluation requires a pole-specific analysis of whether an exception applies.¹⁴⁹

¹⁴⁷ Resp. at ¶ 91; Buie Resp. Decl. Ex. 4 at ¶ 43-49; Kelley Decl. Resp. Ex. 13 at ¶ 7-8.

¹⁴⁸ See, e.g., Buie Decl. Resp. Ex. 4 at ¶¶ 25-28, 63, 70-82; Dagenhart Decl. Resp. Ex. 6 at ¶¶ 16-17.

¹⁴⁹ Buie Decl. Resp. Ex. 4 at ¶ 51.

92. Even if evaluating Complainants' plant under the NESC, there are still 41,215 violations for Comcast, 6,847 for Alliance, and 1,228 for WEHCO. This means that 96.3% of Comcast's' violations, 94.7% of Alliance's violations, and 85.7% of WEHCO's violations would still be violations even assuming, *arguendo*, that they are entitled to be measured by the NESC and qualify for an NESC exception in every possible instance. These violations also constitute a violation of *any version* of the NESC that could possibly apply.¹⁵⁰ Complainants' arguments regarding exceptions, therefore, are largely academic and attempt to distract from the large scale problem and violation data that has not been refuted on the record.¹⁵¹

3. Stipulated Points of Law

93. Complainants cannot stipulate to any points of law for the reasons set forth in subsection 2(a) above.

4. Disputed Points of Law

a) Cable Operators

94. Complainants cannot stipulate to any points of law for the reasons set forth in subsection 2(a) above.

b) EAI

95. EAI is not required to employ the exceptions to the NESC. EAI has made a conscious decision, based on safety, reliability, and potential liability issues, to establish engineering standards that track the NESC in most

¹⁵⁰ Arnett Decl. Resp. Ex. 1 at ¶ 23; Tabor Decl. Resp. Ex. 17 at ¶ 20; Buie Decl. Resp. Ex. 4 at ¶¶ 29, 30, 48, 60, 86; Kelley Decl. Resp. Ex. 11 at ¶ 9.

¹⁵¹ Arnett Decl. Resp. Ex. 1 at Attachment B.

regards but that do not employ exceptions that would be costly, time-consuming, or impractical to employ.¹⁵² Where EAI has attempted to compromise with Complainants and allow use of the NESC and its exceptions rather than the contract standards for purposes of plant clean up, these exceptions to the general provisions of the NESC must be evaluated and applied in the field on a pole-specific basis.¹⁵³ Complainants have not demonstrated on the record that specific violations cited by USS fall under an exception to the NESC. [Complainants cannot stipulate to any of Entergy's statements of fact or law for the reasons set forth above].

96. FCC precedent rejects the attempt that Complainants are making to avoid liability by simply asserting that some/many of its facilities are grandfathered.¹⁵⁴ Under the NESC and *Knology*, grandfathering requires a specific showing that a particular attachment is entitled to grandfathering.¹⁵⁵ Complainants have not offered any evidence as to grandfathering for particular installations, but have only asserted that “many” of their installations are grandfathered. This is legally insufficient and provides no basis for EAI or the FCC to make a determination as to which of the thousands of violations meet the requirements of NESC 013.¹⁵⁶

¹⁵² Buie Decl. Resp. Ex. 4 at ¶¶ 19-29, 55-56, 63, 70-82, 84; Dagenhart Decl. Resp. Ex. 6 at ¶¶ 11-18.

¹⁵³ Buie Decl. Resp. Ex. 4 at ¶¶ 28, 43-44, 57, 85.

¹⁵⁴ *Knology Inc. v. Georgia Power Co.* 18 FCC Rcd. 24,615, at ¶ 39 (2003).

¹⁵⁵ *Id.*

¹⁵⁶ Resp. at ¶ 91; *Knology* at ¶ 39.

Complainants have not carried their burden on the record to demonstrate that particular installations are entitled to grandfathered status.

D. Is It Reasonable To Require Proof/Sign Off From An Arkansas-Licensed Professional Engineer As To The Grandfathered Status Of An Attachment Or As To The Applicability Of An NESC Exception?

1. Stipulated Facts

97. None.

2. Disputed Facts

a) Cable Operators

98. It is neither just nor reasonable for EAI to require Complainants to obtain sign off as to the grandfathered status of each attachment. In addition, it is neither just nor reasonable for EAI to require Complainants to obtain sign off as to whether an attachment meets an exception to a general rule under the NESC. Finally, it is neither just nor reasonable for EAI to require proof or sign off from an Arkansas-licensed Professional Engineer. [EAI cannot stipulate to these statements as they are Complainants' conclusions of law.]

99. EAI does not require attachers other than Complainants to have a state-licensed engineer sign off as to the status of grandfathered facilities or those that meet an exception to an NESC general rule.¹⁵⁷ [EAI cannot stipulate to this statement. EAI has not had the need to conduct safety inspections as to other attachers as of yet.¹⁵⁸ EAI requires an Arkansas-

¹⁵⁷ Dunlap Reply Decl. ¶¶ 4, 5; Response pp. 47-48; Reply V.C.

¹⁵⁸ Resp. ¶¶ 128, 129; Kelley Decl. Resp. Ex. 11 at ¶ 12.

licensed P.E. to sign off on all of the violations that were identified as to its own facilities.^{159]}

100. Recurring conditions can be categorized for design and correction purposes.¹⁶⁰ As an accommodation to EAI, Complainants are willing to have a Professional Engineer certify that certain recurring conditions are Code-compliant.¹⁶¹ [EAI cannot stipulate to these statements. Complainants' "concession" does nothing to address the issue as to whether a particular pole meets the standard designated, which is the crux of the problem.¹⁶² For the sake of argument, assume that poles painted green are compliant. Even if the Cable Operators' P.E. signs off on the proposition that all poles painted green are compliant, the Cable Operators must still identify poles that are painted green. It is impermissible and inappropriate for Complainants to expect EAI to accept a blanket assertion that all Complainants' poles are painted green without a review of the particular pole.^{163]}

101. There is no reason for EAI to treat the grandfathering provision and the exceptions to general rules differently than any other provision of the NESC. All provisions of the Code, including the grandfathering provision

¹⁵⁹ Buie Decl. Resp. Ex. 4 at ¶ 49; Bettis Decl. Resp. Ex 3 at ¶ 21.

¹⁶⁰ Harrelson Reply Report ¶ 78; Reply Sec. VI.

¹⁶¹ Billingsley Reply Decl., ¶ 18; Hooks Reply Decl., ¶ 14; Dial Reply Decl., ¶ 4.

¹⁶² Buie Decl. Resp. Ex. 4 at ¶¶ 28, 43-44, 57, 85; Wagoner Decl. Resp. Ex. 18 at ¶ 47.

¹⁶³ Buie Decl. Resp. Ex. 4 at ¶¶ 28, 43-44, 57, 85; Wagoner Decl. Resp. Ex. 18 at ¶ 47.

and all exceptions to the rules have the full force and effect of the Code.¹⁶⁴ [EAI cannot stipulate to these statements. EAI has agreed to employ grandfathering, and has agreed to allow Complainants to avail themselves of NESC exceptions where they can provide an Arkansas-licensed P.E.'s sign off that an attachment qualifies for grandfathering or the exception sought as to past violations.¹⁶⁵]

102. Moreover, there is no reason for EAI to require that an Arkansas-licensed Professional Engineer make these certifications. The USS field inspectors conducting the inspections and making the determinations that the grandfathering provision and exceptions to general rules do not apply are not Professional Engineers and are not based in Arkansas.¹⁶⁶ EAI has provided no reason in the record why their determinations must be rebutted by an Arkansas-licensed Professional Engineer. [EAI cannot stipulate to these statements. EAI has not asked that a P.E. physically examine each pole in the field. EAI has asked that an Arkansas-licensed P.E. sign off on the compliance of a particular pole, either as to grandfathering or meeting an NESC exception.¹⁶⁷ ACTA may choose another engineer to visit poles in the field and report to a P.E., if an Arkansas-licensed P.E. reviews that person's findings and signs off on them, this would be sufficient. This is

¹⁶⁴ NESC Rule 015 (2002 edition) Intent paragraph D; Reply V.B.2.; Harrelson Reply Report. ¶ 52; Reply Sec. VI.

¹⁶⁵ Buie Decl. Resp. Ex. 4 at ¶¶ 44-49; Kelley Decl. Resp. Ex. 11 at ¶¶ 6-8.

¹⁶⁶ See Response Declarations

¹⁶⁷ Buie Decl. Resp. Ex. 4 at ¶ 49; Kelley Decl. Resp. Ex. 11 at ¶¶ 6-8.

the same standard that EAI applies to itself and is a measure that it employs for liability reasons.¹⁶⁸].

103. Furthermore, in applying (or, rather in this case, not applying) the grandfathering provision and exceptions to rules, EAI does not rely on any special aspects of Arkansas law or engineering standards that would mandate an Arkansas-licensed Professional Engineer. The Code provisions at issue do not deviate from the NESC provisions as adopted by the IEEE. [EAI cannot stipulate to these statements. As an accommodation and to encourage plant clean up, EAI has agreed that the grandfathering provision and exceptions for the NESC may apply as to past violations. As a part of this concession, however, EAI sought sign-off as to the compliance of the particular facilities in question. EAI is not seeking an Arkansas-licensed P.E.'s sign-off as to the NESC provision, but as to whether the facility for which a Cable Operator claims a provision qualifies meets the provision at issue.¹⁶⁹]

104. Requiring a Professional Engineer to examine each pole would be much like requiring a medical doctor to apply all band-aids.¹⁷⁰ [EAI cannot stipulate to this statement. As above, EAI is not seeking to have a P.E. physically inspect each pole. However, an Arkansas-licensed P.E. must sign off on each particular pole as to whether it meets a prior edition of the

¹⁶⁸ Resp. at ¶¶ 52, 128; Buie Decl. Resp. Ex. 4 at ¶ 49; Bettis Decl. Resp. Ex. 3 at ¶ 21.

¹⁶⁹ Inman Decl. Resp. Ex. 9 at ¶ 35.

¹⁷⁰ Harrelson Report ¶ 79; Reply Sec. VI.

code as a grandfathered attachment, or whether circumstances that satisfy an NESC exception are present on a particular pole.^{171]}

105. In addition, EAI does not need certification as to the date Complainants attachments were installed. In Mr. Wagoner's declaration, EAI demonstrated that it already has full knowledge of these facts.¹⁷² [EAI cannot stipulate to this statement. Grandfathering requires specific knowledge of the date of installation or modification to determine which edition of the NESC applies, and whether the attachment in question meets that version of the code.¹⁷³ Complainants have this information as to their own facilities, as they do not apprise EAI of their maintenance or upgrade activities.¹⁷⁴ USS' knowledge or ignorance as to *initial* installation activities is irrelevant given the changes and upgrades that Complainants have undertaken.^{175]}

106. The rules of the NESC give the basic requirements of construction that are necessary for safety. If the responsible party wishes to exceed the requirements for any reason, he may do so for his own purposes but need not do so for safety purposes.¹⁷⁶ The 1990 Edition of the NESC was specifically designed to delete the use of the word 'minimum' because of the

¹⁷¹ Inman Decl. Resp. Ex. 9 at ¶ 35 Buie Decl. Resp. Ex. 4 at ¶43.

¹⁷² See Wagoner Declaration.

¹⁷³ Buie Decl. Resp. Ex. 4 at ¶ 43.

¹⁷⁴ Bettis Decl. Resp. Ex. 3 at ¶ 12; Willems Decl. Resp. Ex 20 at ¶ 14; Harrell Decl. Resp. Ex. 8 at ¶ 23 Buie Decl. Resp. Ex. 4 at ¶¶ 32-34, 81.

¹⁷⁵ Tabor Decl. Resp. Ex. 17 at ¶ 7-8.

¹⁷⁶ Harrelson Reply Report ¶ 49; Alan Clapp, NESC Handbook, 5th edition.

intentional or inadvertent misuse of the term by some to imply that the NESC values were some kind of minimum number that should be exceeded in practice; such is not the case.¹⁷⁷ [EAI cannot stipulate to these statements. The revision to the NESC is irrelevant, as Arkansas Code and the pole attachment contracts specify the NESC as a minimum requirement.¹⁷⁸]

107. EAI provides no basis in safety, reliability or generally applicable engineering principles for requiring the grandfathering provision and exceptions to rules but not other provisions.¹⁷⁹ [EAI cannot stipulate to this statement. EAI has fully justified the safety, reliability other local engineering reasons for its standards.¹⁸⁰ As above, engineering standards may also be implemented for reasons other than safety or reliability, and EAI has fully justified its standards on these grounds as well.¹⁸¹]

b) EAI

108. Even if all parties agreed on the standards to which Complainants should be held, Complainants still must show that its attachments meet that standard. This must be done on a pole by pole basis.¹⁸² [Complainants cannot stipulate to this fact because it is not

¹⁷⁷ Harrelson Reply Report ¶ 49; Alan Clapp, NESC Handbook, 5th edition.

¹⁷⁸ Pole Attachment Agreements at Article 2.3; Ark. Code Ann. § 23-17-236; Buie Decl. Resp. Ex. 4 at ¶¶ 22-24.

¹⁷⁹ Harrelson Reply Report ¶¶ 77-83.

¹⁸⁰ Buie Decl. Resp. Ex. 4 at ¶¶ 20,25-28,63, 65,70-82, 84; Dagenhart Decl. Resp. Ex. 6 at ¶¶ 11-14.

¹⁸¹ Id.; *See also*, Section IV.b.2, *supra*.

¹⁸² Buie Decl. Resp. Ex. 4 at ¶¶ 28, 43-44, 57, 85; Wagoner Decl. Resp. Ex. 18 at ¶ 47 ("The safety of a pole must be evaluated by viewing that specific pole

necessary to provide proof or sign off of recurring conditions on a pole-by-pole basis.^{183]}

109. With respect to violations identified in the safety inspection process, as an accommodation to Complainants, EAI has indicated to the Cable Operators that it is willing to accept certification from an Arkansas-licensed professional engineer as to the status of their cable plant indicating that: (1) an attachment is grandfathered; (2) the cable operator did not cause the cited violation;(3) an exception to a general rule of the NESC applies; or (4) a rule that requires a judgment call does not, in his/her opinion apply to the situation cited.¹⁸⁴ Violations with such certifications would be considered “cleared.”¹⁸⁵ [Complainants are not willing to stipulate to this paragraph because it omits one very important point: that EAI represented that this would only apply to poles that have been reported by USS to have a violation.^{186]}

110. EAI has remedied its own violations under the same process offered to attachers. EAI has procured the sign off of an Arkansas-licensed professional engineer in each instance.¹⁸⁷ EAI has not specified a particular person or firm to perform this function for the Complainants, but has

in context, including evaluation of adjacent poles, vegetation, soil conditions, buildings and activity in proximity to the pole itself.”).

¹⁸³ Harrelson Reply Report ¶ 78; Reply Sec. VI.

¹⁸⁴ Kelley Decl. Resp. Ex. 11 at ¶ 7-8.

¹⁸⁵ Resp. at ¶ 52; Tabor Decl. Resp. Ex. 17 at ¶ 17.

¹⁸⁶ See Harrelson Reply Report ¶¶ 37-45.

¹⁸⁷ Resp. at ¶ 128; Kelley Decl. Resp. Ex. 11 at ¶ 12; Buie Decl. Resp. Ex 4 at ¶ 49; Bettis Decl. Resp. Ex. 3 at ¶ 21.

specified the minimum qualifications for such a Cable Operator selected contractor to include a valid Arkansas P.E. license. [Complainants cannot stipulate to this paragraph because a) Complainants regularly observe EAI's construction department building violations and deviating from EAI's standards in the field¹⁸⁸ and b) Complainants have no independent knowledge of whether EAI has procured sign off of an Arkansas-licensed Professional Engineer of these conditions.]

3. Stipulated Points of Law

111. None.

4. Disputed Points of Law

a) Cable Operators

112. EAI's requirement that Complainants, but not other attachers obtain proof or sign off of grandfathering and exceptions to NESC general rules is unjust, unreasonable and discriminatory in violation of 47 U.S.C. § 224. [EAI cannot stipulate to this statement. EAI requires P.E. sign off of itself, and has not had the occasion to conduct a safety inspection of other attachers as of yet as it has not conducted other safety inspections.¹⁸⁹]

113. It is arbitrary and therefore unjust and unreasonable for EAI to require P.E. certification for certain Code-compliant conditions but not all.¹⁹⁰ [EAI cannot stipulate to this statement. It is unclear what allegation is being

¹⁸⁸ See Section V.D. below.

¹⁸⁹ Resp. at ¶¶ 128, 129; Kelley Decl. Resp. Ex. 11 at ¶ 12; Buie Decl. Resp. Ex. 4 at ¶ 49; Bettis Decl. Resp. Ex. 3 at ¶ 21.

¹⁹⁰ Harrelson Reply Report ¶¶ 77-83; 47 U.S.C. § 224.

made. The sign-off of an Arkansas-licensed P.E. is a reasonable accommodation to which EAI itself adheres.^{191]}

114. If the conditions qualify for either the grandfathering rule or an exception to a general rule, it is unjust and unreasonable for EAI to require any additional certification or analysis.¹⁹² [EAI cannot stipulate to this statement. EAI is not seeking any “additional certification or analysis” and it is unclear what Complainants’ are alleging. As a part of the accommodation that EAI offered to Complainants as remediation of past violations, EAI is simply seeking a certification from an Arkansas-licensed P.E. that a particular pole is grandfathered and meets a prior code or otherwise meets an NESC exception.^{193]}

115. EAI may only deny access for reasons of safety, reliability and generally applicable engineering principles.¹⁹⁴ As a result, any term or condition of attachment other than reasons of safety, reliability or generally applicable engineering principles are unjust and unreasonable.¹⁹⁵ [EAI cannot stipulate to this statement. As identified elsewhere, EAI is not limited to the criteria in 224(f) in determining terms and conditions for

¹⁹¹ Kelley Decl. Resp. Ex. 6 at ¶¶ 6-8.

¹⁹² Harrelson Reply Report ¶¶ 77-83; 47 U.S.C. § 224.

¹⁹³ Kelley Decl. Resp. Ex. 11 at ¶¶ 7-8.

¹⁹⁴ 47 U.S.C. § 224.

¹⁹⁵ *Id.*

attachment. Rather, these terms must be just and reasonable under 224(b).^{196]}

116. EAI's requirement that Complainants provide certification from an Arkansas-licensed Professional Engineer for applications of the NESC's grandfathering provision and exceptions to general rules, but not to any other application of the NESC is inconsistent with standard industry practice and generally applicable engineering purposes. As a result it is an unjust and unreasonable term or condition of attachment.¹⁹⁷ [EAI cannot stipulate to this statement. This issue has not been pleaded, and it is inadequately supported by citation.]

117. EAI does not impose its requirement that Complainants provide certification from an Arkansas-licensed Professional Engineer for applications of the NESC's grandfathering provision and exceptions to general rules, but not to any other application of the NESC, for reasons of safety, reliability or generally applicable engineering purposes. Otherwise, EAI would have consistently required Complainants to comply with this requirement in the past and would currently consistently require that all other attachers on the poles comply with this requirement. As a result, it is unjust, unreasonable and discriminatory.¹⁹⁸ [EAI cannot stipulate to these statements. This issue has not been pleaded, and is not supported by

¹⁹⁶ See, e.g., Section IV.B.2, *supra*.

¹⁹⁷ 47 U.S.C. § 224; Reply pp. 62-64.

¹⁹⁸ 47 U.S.C. § 224; Harrelson Reply Report ¶¶ 77-78; Reply Sec. VI; Billingsley Reply Decl., ¶ 18; Hooks Reply Decl., ¶ 14; Dial Reply Decl., ¶ 4.

citation. The requested sign-off is a reasonable mechanism as part of an offered compromise to allow the Cable Operators to certify compliance while satisfying potential liability concerns following a safety inspection.¹⁹⁹ EAI has not needed to conduct safety inspections as to other attachers as of yet, as cited above.]

118. According to the NESC, EAI's heightened requirements do not increase safety.²⁰⁰ Having failed to justify or establish that its heightened requirements are for reasons of capacity or reliability, they unjust and unreasonable. [EAI cannot stipulate to these statements for the reasons cited above.]

119. It is unjust and unreasonable for EAI to require a Professional Engineer certify as to each pole's compliance with the NESC.²⁰¹ [EAI cannot stipulate to this statement for the reasons cited above.]

120. Because the P.E. requirement is not for reasons of safety, reliability or generally applicable engineering principles, it is unjust and unreasonable to require P.E. sign off as a term or condition of attachment. [EAI cannot stipulate to this statement for the reasons cited above.]

b) EAI

121. Sign off by an Arkansas-licensed P.E. was offered as a reasonable compromise to allow Complainants to utilize the complex exceptions to the NESC that are not a part of EAI's existing contract

¹⁹⁹ Kelley Decl. Resp. Ex. 11 at ¶¶ 6-8.

²⁰⁰ Harrelson Reply Report ¶ 49; Allan Clapp, NESC Handbook, 5th edition.

²⁰¹ Harrelson Report ¶¶ 78-79, Reply Sec. VI.

standards.²⁰² FCC pole attachment precedent endorses the ability of a utility to prescribe qualifications for a Cable Operator's hired contractors.²⁰³ EAI is not dictating who should be employed, but is specifying qualifications for that party that it requires of itself. EAI is thus permitting Complainants to certify as to their own compliance, so long as the certification is done in a manner that is sufficiently reliable to satisfy EAI's liability concerns. EAI requires P.E. sign of itself. ²⁰⁴ This is wholly reasonable. [Complainants cannot stipulate to this point of law. FCC permits pole owners to set *reasonable* standards for contractors working on their poles. More important, EAI misconstrues the FCC's precedent cited on two fronts. First, the FCC's pronouncement regarding the qualification of workers extended only to contractors "who will work attaching or making ready attachments...in the proximity of electric lines" and did not extend to contractors inspecting poles.²⁰⁵ Second, even if that provision did apply, it would support, not defeat Complainants' position. In *Cavalier*, the FCC specifically said that an attacher may use any contractor that meets the same qualifications in terms of training as the utilities' own workers. In this case, EAI's inspection crews

²⁰² Kelley Decl. Resp. Ex. 11 at ¶¶ 6-8.

²⁰³ *Local Competition Recon. Order*, 14 FCC Rcd 18049, at ¶¶ 81-87 (1999), *aff'd sub nom. Southern Co. v. FCC*, 293 F.3d 1338, 1350-1351 (11th Cir. 2002).

²⁰⁴ Kelley Decl. Resp. Ex. 11 at ¶ 12; Buie Decl. Resp. Ex. 4 at ¶ 49; Bettis Decl. Resp. Ex. 3 at ¶ 21.

²⁰⁵ *Cavalier Tel. v. Virginia Elec. Power Co.*, 15 FCC Rcd. 9563, ¶ 18 (2000). *Local Competition Recon. Order*, 14 FCC Rcd 18049, at ¶¶ 81-87 (1999).

are not Professional Engineers and are not based in Arkansas.²⁰⁶ In addition, EAI's construction crews make judgment calls and waivers in the field regularly as does its contractor USS.²⁰⁷ As a result, EAI's requirement that a Professional Engineer licensed in Arkansas proof or otherwise sign off on compliance is a requirement that exceeds the qualifications of its own workers and is unjust and unreasonable.]

E. Whether EAI's Application (Or Not) Of The NESC's Grandfathering Provisions, Rule Exceptions And Safety Standards That Exceed The NESC Are Just And Reasonable.

1. Stipulated facts

122. Section 013.B.2 of the 2002 Edition of the NESC states that "existing installations, including maintenance replacements, that currently comply with prior editions of the Code, need not be modified to comply with these rules except as may be required for safety reasons by the administrative authority."

123. Section 2.3(B) of the Agreements states that "[t]he Cable Company's cables, wires, and appliances, in each and every location, shall be erected and maintained in accordance with the specifications of the Electric Company, or any amendments or revisions of said specifications at the location designated by the Electric Company. Drawings marked 1, 2, 3, and 4 attached hereto and by this reference thereto incorporated herein, when not

²⁰⁶ See Response Declaration.

²⁰⁷ Billingsley Reply Decl., ¶ 40; Hooks Reply Decl., ¶ 24; Allen Reply Decl., ¶ 19. (See Reply Sec. III.D.2)

otherwise specified by the Electric Company, are descriptive of the minimum required construction standards under some typical conditions..."²⁰⁸

124. Section 013.B.3 of the 2002 Edition of the NESC states "Where conductors or equipment are added, altered, or replaced on an existing structure, the structure or the facilities on the structure need not be modified or replaced if the resulting installation will be in compliance with either (a) the rules that were in effect at the time of the original installation, or (b) the rules in effect in a subsequent edition to which the installation has been previously brought into compliance . . ."

2. Disputed facts

a) Complainants

125. Arkansas state law and the EAI Agreements provide that the NESC applies to attachments on EAI poles.²⁰⁹ [EAI cannot stipulate to this statement for the reason stated below in the disputed fact section.]

126. The NESC contains a specific grandfathering provision to protect existing installations from costly and unnecessary modifications arising from changes in the NESC over time.²¹⁰ [EAI cannot stipulate to this statement as it is an incomplete statement of the NESC. See the Disputed Facts Section below.]

²⁰⁸ Compl. Ex. 2A-2D.

²⁰⁹ EAI Pole Attachment Agreement, Compl. Exh. 2A-2D.

²¹⁰ NESC Section 013.B.2. Harrelson Report

127. The grandfathering provision and all exceptions to the rules have the full force and effect of the Code.²¹¹ [EAI cannot stipulate to this statement as it is irrelevant.]

128. Specifically the grandfathering provisions state that: “existing installations, including maintenance replacements, that currently comply with prior editions of the Code, need not be modified to comply with these rules except as may be required for safety reasons by the administrative authority.”²¹²

129. Furthermore, “[w]here conductors or equipment are added, altered, or replaced on an existing structure, the structure or the facilities on the structure need not be modified or replaced if the resulting installation will be in compliance with either (a) the rules that were in effect at the time of the original installation, or (b) the rules in effect in a subsequent edition to which the installation has been previously brought into compliance . . .”²¹³ [EAI cannot stipulate to the prior two statements as they are an incomplete statement of the the NESC. See the Disputed Facts Section below.] EAI and USS are not applying the grandfathering provision. Instead, EAI and USS are requiring Complainants’ upgraded facilities to comply with the latest edition of the NESC.²¹⁴ [EAI cannot stipulate to this statement. EAI will

²¹¹ NESC Rule 015 (2002 edition) Intent paragraph D; Reply V.B.2.; Harrelson Reply Report. ¶ 52; Reply Sec. VI.

²¹² NESC Section 013.B.2.

²¹³ NESC Section 013.B.3.

²¹⁴ *See, e.g.*, Declaration of Bennett Hooks at ¶ 27 (Compl. Exh. 4).

permit grandfathering.²¹⁵ Complainants, however, are in possession of the installation and upgrade information with respect to their own attachments in order to apply any grandfathering that is appropriate.²¹⁶ Grandfathering is also irrelevant to the vast majority of the cited violations, as 95% of the cited conditions do not meet the standards or exceptions of any version of the NESC.]²¹⁷

130. In most instances, an upgrade does not involve installing new attachments or changing the locations of any of the existing attachments.²¹⁸ [EAI cannot stipulate to this statement. Complainants have not provided EAI with notice as to maintenance or other activities, and have not informed EAI of the upgrade activities undertaken. Recent upgrade activities, however, required Complainants to touch all facilities and to replace all active and passive electronics.²¹⁹]

131. Cable upgrades conducted by the Complainants are not “new attachments” subject to the standards set forth in the current version of the NESC, but are “modifications” and “additions” to an existing structure.²²⁰ As a result, they are grandfathered—or, in other words, subject to the NESC

²¹⁵ Buie Decl. Resp. Ex. 4 at ¶ 46.

²¹⁶ Buie Decl. Resp. Ex. 4 at ¶ 49.

²¹⁷ Arnett Decl. Resp. Ex. 1 at ¶ 23; Tabor Decl. Resp. Ex. 17 at ¶ 20; Buie Decl. Resp. Ex. 4 at ¶¶ 29, 30, 48, 60, 86; Kelley Decl. Resp. Ex. 11 at ¶ 9.

²¹⁸ Declaration of Marc Billingsley at ¶ 12 (Exh. 6); Declaration of Bennett Hooks at ¶ 10 (Exh. 4).

²¹⁹ Carpenter Decl. Resp. Ex. 5 at ¶ 7; Tabor Decl. Resp. Ex. 17 at ¶¶ 6-7.

²²⁰ Declaration of Marc Billingsley at ¶ 12 (Exh. 6); Declaration of Bennett Hooks at ¶ 10 (Exh. 4).

requirements in effect at the time the cable operator installed the original attachment.²²¹ [EAI cannot stipulate to these statements for the reasons cited above. Complainants do not provide EAI with notice of the activities they conduct with respect to their facilities or when they conduct these operations. As such, EAI has no knowledge as to whether such activities would or would not impact the grandfathered status of Complainants' attachments.²²² This is information wholly within Complainants' control.²²³ Moreover, 95% of the violations cited do not meet the standards or exceptions of *any version* of the NESC, and as such grandfathering is irrelevant.²²⁴]

132. The EAI Pole Agreements states that Complainants' attachments must conform to the NESC, "including all supplements and future revisions..."²²⁵

133. The Agreements also state that "[t]he requirements of the NESC may be supplemented as required by developments and improvements in the industry, such supplements to be mutually agreed upon and approved in writing by the Chief Engineer of the Cable Company and the Manager, Distribution Engineering, of the Electric Company."²²⁶ [With respect to the two preceding paragraphs, EAI will stipulate to the following: The EAI Pole

²²¹ Harrelson Report at ¶ 11 (Exh. 15).

²²² Buie Decl. Resp. Ex. 4 at ¶ 46.

²²³ Buie Decl. Resp. Ex. 4 at ¶ 49.

²²⁴ Arnett Decl. Resp. Ex. 1 at ¶ 23; Tabor Decl. Resp. Ex. 17 at ¶ 20; Buie Decl. Resp. Ex. 4 at ¶¶ 29, 30, 48, 60, 86; Kelley Decl. Resp. Ex. 11 at ¶ 9.

²²⁵ Compl. Exh. 2A-2D.

²²⁶ EAI Pole Agreements at § 2.3(A) (emphasis added) (Exh. 2A-2D).

Agreements state that Complainants' attachments "shall at all times, as a minimum, be in conformity with the practices as prescribed by the [NESC], including all future revisions and supplements thereto, and where the requirements of public authorities may be in excess of the requirements of the [NESC] the requirements of the public authorities shall be followed." The Agreements also state that "[t]he requirements of the [NESC] may be supplemented as required by developments and improvements in the industry, such supplements to be mutually agreed upon and approved in writing by the Chief Engineer of the Cable Company and the Manager, Distribution Engineering, of the Electric Company."²²⁷

134. Section 2.3(B) of the Agreements states that "[t]he Cable Company's cables, wires, and appliances, in each and every location, shall be erected and maintained in accordance with the specifications of the Electric Company, or any amendments or revisions of said specifications at the location designated by the Electric Company. Drawings marked 1, 2, 3, and 4 attached hereto and by this reference thereto incorporated herein, when not otherwise specified by the Electric Company, are descriptive of the minimum required construction standards under some typical conditions..."²²⁸

135. Complainants have never agreed to be subject to requirements in excess of the NESC standards set forth at the time of the original installation of the attachment or to otherwise waive application of the

²²⁷ EAI Pole Agreements at § 2.3(A) (Exh. 2A-2D).

²²⁸ Compl. Ex. 2A-2D.

grandfathering provision.²²⁹ [EAI cannot stipulate to this statement. The provisions in question are present in current and prior contracts, and have not been altered since the pole attachment agreements were executed or assigned.²³⁰]

136. The Code, including the grandfathering provision and all exceptions to the rules have the full force and effect of the Code.²³¹ [EAI cannot stipulate to this statement for the reasons cited above.]

137. EAI need not impose standards in excess of the NESC for safety purposes.²³² [EAI cannot stipulate to this statement for the reasons cited above.²³³]

138. Imposing the heightened standards, EAI cites Complainants for “violations” where the conditions otherwise comply with industry-accepted safety standards.²³⁴ These “violations” are not safety violations.²³⁵ [EAI cannot stipulate to this statement for the reasons cited above. EAI’s contract standards are in conformance with industry accepted safety standards.²³⁶

²²⁹ Complaint ¶ 253.

²³⁰ See Exhibits “2A-2D” of the Complaint; Resp. Ex. 72; Bettis Decl. Resp. Ex. 3 at ¶ 8; Neumeier Decl. Resp. Ex. 14 at ¶ 8; Welch Decl. Resp. Ex. 19 at ¶ 6; Willems Decl. Resp. Ex. 20 at ¶ 8.

²³¹ NESC Rule 015 (2002 edition) Intent paragraph D; Reply V.B.2.; Harrelson Reply Report. ¶ 52; Reply Sec. VI.

²³² Harrelson Reply Report ¶ 49; Alan Clapp, NESC Handbook, 5th edition.

²³³ See, e.g., Section IV.B.2, *supra*.

²³⁴ Harrelson Reply Report ¶¶ 55-63.

²³⁵ Harrelson Reply Report ¶¶ 55-63.

²³⁶ Dagenhart Decl. Resp. Ex. 6 at ¶¶ 13-14 (“Utilities, therefore, as a practice, design facilities on poles, including initial clearances for lines and communications cables, using standards which exceed the NESC...”); Jackson

More than 95% of violations cited do not meet the standards or exceptions of any version of the NESC, which is clearly impermissible.^{237]}

b) EAI

139. EAI's position is the same as for the prior section on grandfathering and is as follows.²³⁸

140. The Arkansas Code states that "construction of telecommunications lines and facilities by a telecommunications company or cooperative as a minimum requirement shall comply with the standards of the [NESC] in effect at the time of construction..."²³⁹ The EAI Pole Agreements state that Complainants' attachments "shall at all times, as a minimum, be in conformity with the practices as prescribed by the [NESC], including all future revisions and supplements thereto, and where the requirements of public authorities may be in excess of the requirements of the [NESC] the requirements of the public authorities shall be followed." The Agreements also state that "[t]he requirements of the [NESC] may be supplemented as required by developments and improvements in the industry, such supplements to be mutually agreed upon and approved in

Decl. Resp. Ex. 10 at ¶¶ 5-7 (survey of practices of SEE member utilities); In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers Local Competition Order 14 FCC Rcd. 18049 at ¶¶ 1143-1150 (1999); Buie Decl. Resp. Ex. 4 at 25-28, 63, 84.

²³⁷Arnett Decl. Resp. Ex. 1 at ¶ 23; Tabor Decl. Resp. Ex. 17 at ¶ 20; Buie Decl. Resp. Ex. 4 at ¶¶ 29, 30, 48, 60, 86; Kelley Decl. Resp. Ex. 11 at ¶ 9.

²³⁸ See, e.g., Section IV.C.b, *supra*.

²³⁹ Ark. Code Ann. § 23-17-236.